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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1123

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

NORMAN B. FROST,
FRANK N. MYERS,
FREDERIC N. TOWERS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

Petitioner seeks to have reviewed by this Honorable Court a decision of the Court of Claims of the United States, rendered January 8, 1945, involving questions arising out of a government construction contract.

Points Involved

1. WHETHER, UNDER A CONTRACT FOR CONSTRUCTING BUILDINGS, THE UNITED STATES IS ANSWERABLE IN DAMAGES TO THE PRIME CONTRACTOR FOR EXTENSIVE DELAY DUE TO ABANDONMENT BY A SECOND GOVERNMENT CONTRACTOR OF ITS CONTRACT FOR INSTALLATION OF HEATING, PLUMBING, ELECTRICAL AND OTHER MECHANICAL FIXTURES.

2. WHERE THERE WAS AN ADMITTED DELAY TO THE PRIME CONTRACTOR OF 352 DAYS DUE TO SLOWNESS AND INEFFICIENCY OF THE MECHANICAL TRADES, PART OF WHICH DELAY OCCURRED WHEN THE GOVERNMENT'S MECHANICAL CONTRACTOR WAS ON THE JOB AND PART AFTER THE GOVERNMENT ITSELF TOOK OVER THE MECHANICAL WORK, WHETHER IT WAS NECESSARY FOR PLAINTIFF TO SEPARATE ITS PROOF TO SHOW ONLY THE AMOUNT OF DAMAGE SUFFERED AFTER THE GOVERNMENT TOOK OVER.

3. WHETHER THE GOVERNMENT IS LIABLE FOR ADDITIONAL WORK, IN THE ABSENCE OF A WRITTEN CHANGE ORDER, WHERE SUCH WORK ALTHOUGH NOT PART OF THE ORIGINAL CONTRACT WAS ESSENTIAL FOR COMPLETION OF THE PROJECT, WAS NECESSITATED BY FAILURE OF THE GOVERNMENT TO FURNISH PROPER PLANS, AND WHERE THE COST COULD NOT BE ESTABLISHED IN ADVANCE OF DOING THE WORK.

Opinions Below

The opinions of the Court of Claims in the instant case, Cause No. 43,808, and in the related case of *Holpuch* v. *United States*, Cause No. 43, 813, both handed down January 8, 1945, for convenience are printed in an Appendix hereto.

Short Statement of the Facts

This case arises out of a construction project for Veterans' Bureau hospital buildings and nurses' home at Leavenworth, Kansas. Originally, a contract for the project was let to Joseph A. Holpuch Company, but that contract was terminated by the Veterans' Bureau for lack of progress.

Although termination of the original contract was reported to the Court of Claims by its Commissioner to have been "arbitrary, capricious and unreasonable" the Court itself made no finding on that point. (Appendix, Opinion in No. 43,813, finding "6")

Following the order of termination of the Holpuch contract, conferences were held in the Veterans' Bureau at Washington, D. C., attended by the original contractor, the surety on the original contractor's bond (petitioner hereunder) and various officials, including the head of the Bureau. At these conferences, the Holpuch Company submitted data to prove that it would have no difficulty in finishing the job. The Holpuch Company's request for reinstatement was denied and an oral agreement entered into with petitioner, whereby it agreed to take over and complete the job within the terms of the original contract.

Delay and Obstruction by the Government and Its Mechanical Contractor. Work on the construction project in question had been divided by the government into two contracts, the one originally let to Holpuch covering the general construction, and a second contract between the United States and P. H. Meyer Company, of Louisville, Kentucky, in the sum of $183,900, covering the so-called mechanical trades, that is, installation of plumbing, electrical, ventilating, steamfitting and heating equipment. The plumbing and steamfitting work covered by the Meyer contract included all fixtures, bathrooms, toilets, etc., numerous in a building of this sort, as well as the risers, pipes, water pipes, soil pipes and vents. Neither the original contractor, Holpuch Company, nor petitioner had any contractual relationship or obligation respecting the installation and completion of the mechanical trades work covered by the P. H. Meyer Company contract.

From the start until the end of the job, the work of the mechanical trades was in such a state of confusion and delay as to cause disorganization of the general contractor's work.

About midway the job, the Meyer Company's contract was suspended by the United States, it quit the job, and all work

on the project was stopped. The surety on the Meyer Company's bond failed at about the same time, and after a 53 day total suspension of work, the government itself undertook to complete the mechanical trades work by day labor. Progress after the government took over the mechanical work was slow and unsatisfactory and impeded petitioner's progress very substantially. The completed project was accepted by the government 333 days behind schedule. The acting head of the Veterans' Bureau in a formal administrative ruling found petitioner to have been delayed a total of 352 days by failure of the mechanical contractor and the government to perform the mechanical work orderly and on time. In the administrative ruling no segregation was made as to how many days delay were due to the mechanical contractor and how many to the workmen directly employed by the government after Meyer Company quit the job. The Court of Claims, in the above situation, held that:

> "It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. *It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor.* It was not the defendant that caused these delays; they were caused by a third party." (Italics supplied.)
>
> "But the findings of fact of the Director of Construction, show that after the defendant took over this work from the P. H. Meyer Company there was still some delay on the job. For such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages caused thereby. Plaintiff undertook to show its damage for the entire delay caused by the doing of the plumbing, electric, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item."

Altogether, the damages proven by petitioner as a result of these delays amounted to $54,840.27.

Extra work—Additional lathing and plastering on account of changes in location of pipes and risers. The location of vertical plumbing, steam and water pipes, stacks and risers, were shown on the architectural drawings, which were the contractor's guide in preparing its bid, and in detail on the mechanical drawings. Due to discrepancies between the architectural and mechanical drawings (of which there were about 500) many changes had to be made in the location of these pipes and risers after the job started. For example, in many instances the mechanical contractor was ordered to vary the location as shown on the plans of steam risers and vertical pipes which otherwise would have run vertically through the reinforced concrete beams at various floor levels. Where pipes had to be furred or enclosed, the fact that in many instances they were moved out from the wall a greater distance than originally shown on the drawings increased the cost of the lathing and plastering, as the false wall had to be built up out of channel iron and metal lath, and plastered.

In the construction of buildings sometimes these vertical pipes are exposed and sometimes they are enclosed. In the architectural plans on this job all pipes in the Nurses' Home were shown as concealed but with respect to the other buildings the plans did not show any concealment or furring for the vertical pipes, risers, etc. The contractor hence did not estimate on any furring except as shown on the drawings, namely, in the Nurses' Home, covering an area of approximately 22,000 square feet. Despite petitioner's protests the government superintendent in charge ordered approximately 75,000 square feet of furring and plastering done around these pipes and risers, advising petitioner that it

would have to go ahead and do the extra furring and plastering as directed and file a claim for anything deemed not within the contract. A claim covering the extra furring and plastering was filed about one month after the job was completed. The necessity of doing this additional work was not contemplated and could not have been foreseen by the original contractor or petitioner.

The cost of this extra furring, lathing and plastering was $13,403.97.

The Court below barred this item of claim on the ground that it was extra work which, under Article V of the contract, should have been covered by a written change order.

However, these changes were of such a necessary and fundamental nature that they were essential to production of completed structures, and their cost could not have been determined in advance due to the fact that the government superintendent of construction had to locate the pipes and risers as the job progressed because of failure of the government to furnish proper plans.

Due to failure of the government to furnish heat pursuant to its contract obligation, and because of the delay occasioned by failure of the government mechanical contractor (and after its abandonment of its contract, failure of the government's own workmen), the contract plastering and furring cost $13,809.73 more in wages than it would otherwise have cost. Plaintiff did not (and could not) segregate its proof by showing how much of the extra cost was attributable to failure of the government to furnish heat, how much to delay by the government's mechanical contractor and how much by the government's own workmen. *Presumably*, because of that lack of segregation of proof, the item was disallowed. The word "presumably" is used because while the Court below did allow a small item of claim for repairing cracks in plaster, due to the same failure

of the government to furnish heat (on the ground that failure to furnish heat constituted a breach of contract), this item of claim of $13,809.73 for additional labor due to delay occasioned by the failure of heat *and* to the general delay caused by the mechanical trades, was nowhere specifically referred to in the opinion below.

Several other items of extra work claimed below are abandoned insofar as this petition and any further proceedings are concerned because of the smallness of the amounts involved or of existence of controversy regarding the facts.

WHEREFORE, believing that the Court of Claims of the United States was in error in refusing, by its decision, to allow items of claim referred to herein, petitioner prays that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the Court of Claims of the United States entered on January 8, 1945, in Cause No. 43,808, entitled Standard Accident Insurance Company v. United States.

NORMAN B. FROST,
FRANK N. MYERS,
FREDERIC N. TOWERS,
Counsel for Petitioner.

Jurisdiction

Jurisdiction to issue the Writ prayed for is conferred upon this Honorable Court by Section 3 (b) of the Act of February 13, 1925, as amended.

Principal Ground Relied Upon by Petitioner

The principal ground relied upon by Petitioner for allowance of the Writ can be summarized as follows:

The Court of Claims of the United States, in the face of an admission to the contrary in the government's brief, in the absence of oral argument on the point, and without citation in its opinion of any authority or statement of supporting reason or logic, has boldly announced a rule of contract law* contrary to that contained in the text books and in all reported decisions, and, especially, contrary to an unbroken record of decision in the Court of Claims.

Should the Court of Claims have been right in changing the law, the pronouncement should be given sanction by an opinion from this Honorable Court: should the Court below have been in error, the substantial injustice done petitioner should be remedied.

Contract Provisions Involved

The following provisions of the contract, which was upon a standard government form, may be pertinent.

"Article 3. *Changes.* The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due

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* That a contractor "is clearly not entitled to recover from the defendant (owner) damages for delays caused by an (the owner's) independent contractor".

under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

"Article 5. *Extras.* Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

ARGUMENT

The Court below was in error in holding that defendant was not liable in damages for delays due to slowness and disorganization of its mechanical contractor.

The Department of Justice, in its brief in the Court of Claims, had only the following to say regarding plaintiff's claim for damages due to delay:

> "Plaintiff's brief confines its arguments on the law to the proposition that where the Government breaches a contract by delaying a contractor, the contractor may recover for all loss or damages sustained thereby. We cannot take issue with such a well-established proposition, but the question in the case is not only whether there was a contract, but whether the contractor sustained any loss or damage."

Government counsel did not refer to the point at all in his oral argument.

The factual situation as shown by the findings was that plaintiff had been delayed 352 days by the mechanical trades. Its original mechanical contractor having abandoned the job, after disorganization and delay, the government took direct charge of the mechanical work. The delay of 352 days to plaintiff had occurred partly before the abandonment by the government's mechanical contractor and partly after the government itself took over. There was and is no dispute about the extent of the delay or the fact that both the government and its mechanical contractor shared the responsibility. The Department of Justice having admitted plaintiff's position in its brief, the Court of Claims out of a clear sky dismissed the delay claims with the mere statement:

> "Plaintiff's last claim is for damages for delays caused by failure to do promptly the plumbing, heating, electrical work, etc. The P. H. Meyer Company, of Louisville, had an independent contract with defendant for the doing of this work, but its right to proceed under its contract was cancelled on March 31, 1933, and thereafter this work was performed by the defendant itself.
>
> "It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. *It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor, and not involving any fault on the part of the defendant.* * * * (Italics supplied)
>
> "But the findings of fact of the Director of Construction of the Veterans' Administration, approved by the Assistant Administrator of the Veterans Administration, show that after the defendant took over this work * * * there was still some delay on the job. For such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages

> caused thereby. Plaintiff undertook to show its damages for the entire delay caused by the doing of the plumbing, electrical, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item."

Although every decision of the United States Court of Claims since its inception was to the contrary, and in the face of contrary text book law and decisions in the other Federal and State courts, the Court below did not make any statement of reason or logic for changing the rule.

The most commonly used book of quick reference, Corpus Juris, contains the following statement:

> "The owner is liable in damages to the builder, for a delay in performance on his part, or caused by some act of his or of his representative. * * * The owner is also, in the absence of any stipulation in the contract exempting him therefrom, liable for damages from delays caused by the failure of other contractors to perform work which they have undertaken to do for the owner, and which, as regards the contractor, the owner is under obligation to do." 9 C. J. p. 790.

The gist of the above statement is carried over in Corpus Juris Secundum, Vol. 17, p. 1060. The following authorities, among other, are cited in the footnote:

Nelson v. *Pickwick Associated Co.*, 30 Ill. A. 333;
Norcross v. *Wills*, 198 N. Y. 336; 91 N. E. 803;
State v. *Farish*, 23 Miss. 483;
See v. *Patridge*, 9 N. Y. Supp. 463.

In the *Nelson* v. *Pickwick Associated Co.* case, *supra*, it was held that a building construction contract, such as the one here involved, implies an obligation on the part of the owner to keep the building in such a state of forwardness as to enable the contractor to perform his work within

the time stipulated; and that for a breach of this duty the owner is liable to the contractor for extra work and labor.

In the opinion in *Norcross* v. *Wills*, 198 N. Y. 336; 91 N. E. 803, it is stated:

> "The rule may be assumed to be well settled by the authorities and it is founded in justice that where a party has assumed a positive obligation * * * a corresponding obligation if not expressed in terms will nevertheless be implied as resting upon the other party to whom the agreement runs, to be answerable for all losses caused by delays which his control of the work may make him responsible for, either because the contract itself was not so framed as in the event of their happening either to exempt him or to permit the inference of an intention that responsibility should rest elsewhere."

The above cases in addition to serving as precedents, furnish a background of logic for the rule of law that was universally in effect up to the time of the complained of decision of the Court of Claims.

In *State* v. *Farish, supra*, the contractor was permitted to recover against the State (of Mississippi) for damages due to delay in completing his contract caused by failure of the State's other, independent contractor to timely furnish lumber.

In Volume 9, American Jurisprudence, Section 50, p. 37, under the title "Building and Construction Contracts", is found the following:

> "It appears to be a well settled rule that if a contractor agrees to do work within a specified time and is prevented or delayed in performing the contract by act or default of the other party, or by the acts of persons for whose conduct the latter is responsible, the delay thus occasioned is excused, and the contractor may not be held liable * * * for non-compliance with the terms of the contract."

A Federal District Court case holding the government liable to its prime contractor for delays of another government contractor doing subsidiary work is *Langford* v. *U. S.* 95 F. 933.

The case of *Del Genovese* v. *Third Avenue R. R. Co.*, 13 App. Div. N. Y. 412, is another case where the contractor recovered for delays occasioned by an independent contractor of the owner. In its opinion, the Court said:

> "There can be no question but that under this contract, there was 'an implied understanding by all parties that they (the plaintiffs) were to be unrestricted in the employment of means to perform it (the contract), and that nothing which it was the duty of the owner to do to enable the contractor to perform should be left undone.' " (Citing Mansfield v. N. Y. C. R. R., 102 N. Y. 213.)

But it is in the decisions of the Court of Claims of the United States itself that the principle has found the most solid support (and no criticism) throughout the years.

In deciding *Cotton* v. *U. S.*, 38 C. Clms. 536 (1903) where a prime contractor was delayed by the government's dredging contractor, the Court said:

> "Upon the findings we feel warranted in the conclusion that justice requires that defendant compensate the plaintiffs for the reasonable damages the latter have sustained in consequence of the delay in the prosecution of their work, caused by defendant's dredge contractor's failure to diligently prosecute their work."

Later cases in the Court of Claims without exception have given expression to the same views where the point was involved.

In the case of *Miller* v. *U. S.*, 49 C. Cls. 276, the principle was attacked by the government. In deciding in favor of plaintiff, the Court said:

"Where a contractor is delayed to his injury in the performance of a contract by a breach of contract by the owner, the rule is, of course, elementary that the latter must respond in damages.

"It is contended, however, by the defendants that the delay in this case having been caused by the misconduct of another contractor, they are not liable.

"We know of no authority or reason for such a contention. The defendants were under a reciprocal obligation with the claimant to properly prepare the site where he was to build the pier which he had obligated himself to contruct. Like nearly all of the work done by the defendants, the preparatory work was to be done by another contractor; but in a legal view and in so far as the contractural relation between the claimant and the defendant is concerned, this work was to be done by the latter. If the dredging company failed to perform its contract in time to the damage of the claimant, the latter had no recourse against it because there was no privity of contract between them. It was the defendants and not the dredging company who were under legal obligations to the claimant to prepare the site.

"The case of *Cotton* v. *U. S.* 38 C. Cls. 536, is almost identical with this. In that case the damage to the claimant was caused by the failure of another contractor with the defendants to make a timely preparation of the site where the work contracted to be done was to be performed. And the Court laid down the rule that where a contractor with the government sustains damage caused by the unreasonable delay of another contractor of the defendants to do the work necessarily preliminary to the work of the former, he is entitled to recover of the government."

Other Court of Claims decisions to the same effect are—

Edgemoor v. *U. S.*, 61 C. Cls. 392, where the Court said:

"The government cannot excuse itself upon the theory that the foundations were not ready because the delay was caused by the contractors with whom the government had contracted to have them ready. It took upon

itself the obligation to have the foundations in place for the performance of the work by the plaintiff; the plaintiff cannot be punished because of the failure of a third party to perform a contract with which the plaintiff had nothing to do."

In *Largura* v. *U. S.*, 88 *C. Cls.* 531, the principle was accepted without opposition. Contractor had undertaken the construction of a post office. The government was to furnish models for stone carving. A contract was let by the Treasury Department to an artist to make the designs for the models. His first design of the eagle to go over entrances was a bird with two heads. This and other designs were returned, which resulted in the contractor being delayed several months. The Court granted a substantial recovery for the delay, both government counsel and the Court, apparently, accepting as settled the rule that the government is liable to the builder for delay caused by one of the government's own contractors.

To like effect is the decision in *John Morrell & Co.* v. *U. S.*, 94 C. Cls. 490.

The point under argument was the subject of an annotation in 8 British Ruling Case Law, pp. 631-2. The writer of the annotation reaches the conclusion that the rule "applies where the owner has contracted with a third person for the performance of work the due completion of which is necessary to the performance of an independent contract".

The following American cases are cited: *Nelson* v. *Pickwick Associated Co.* (1889), *supra;* and *W. H. Stubbings Co.* v. *World's Columbian Exposition Co.* (1903), 110 Ill. App. 210.

In the latter case, the Appellate Court, in reversing the lower Court, said (p. 221):

"It is claimed that appellant suffered loss by reason of the delay in getting the buildings in readiness for the

performance of the contracts within the time specified. The propriety of an allowance of claims for damages for such delay when supported by the evidence, has been recognized. *Tobey* v. *Price* 75 Ill. 645-647; *Michigan Ave. M. E. Church* v. *Hearson* 41 Ill. App. 89-92, and the contractor was not obliged to abandon the work and sue for damages, but had the right to proceed to complete it and then claim damages."

The annotation followed a decision by the Scottish Court of Sessions of the Scotch case of *Duncanson* v. *Scottish County Investment Co., Ltd.* (8 B. R. C. 610).

The facts in the *Duncanson* case were that the contractor sued the owner to recover balance of contract price withheld when the contractor failed to complete his share of the work due to the failure of another contractor to get his work done soon enough for the suing contractor to commence performance. The owner counterclaimed on the ground that the suing contractor had failed in his performance by not completing his work on time. The contractor whose failure to get his work timely done had prevented the suing contractor from performing on time, was bound by no time limit in his contract.

The Court held in favor of the suing contractor. Lord Dundas in his opinion said:

> "The pursuers maintain that their undertaking was not absolute and independent but was subject to the implied condition precedent that the other work on the tenements should be completed at such date or dates as to make it possible for the pursuers to finish their department of the work by 15 April 1910.
>
> "I think the pursuer's contention of the contract is the right one. I agree with the learned Sheriff in thinking that the defender's construction is not one which would readily be preserved in the absence of clear and specific expression to that effect * * *."

Lord Gutherie in a separate opinion, justified the court's decision upon the well established principle of building con-

struction law that "there is an implied contract on the part of the owner to keep work in such a state of forwardness as will enable the builder to perform his contract within a time limited".

An analogous rule is firmly established in the Courts of the United States, namely, that in every building construction contract there is an implied agreement that the contractor will not be delayed or obstructed in any manner by the person for whom the work is to be done, and if he is so delayed, he can recover damages for loss so sustained. This long established and undisputed rule furnishes the foundation for the principle of law which petitioner seeks to sustain. The following are selected from many American cases wherein the rule is given application:

Hart v. *American Concrete Steel Co.*, 278 Fed. 541-544;
Ryder Building Co. v. *Albany*, 176 N. Y. S. 456;
Mansfield v. *N. Y. C. & H.*, 102 N. Y. 205; 6 N. E. 386;
Cliff v. *Dupont Engineering Co.*, 298 Fed. 649;
Norcross v. *Wills*, 198 N. Y. 336; 9 N. E. 803;
Stehlin-Miller-Henes Co. v. *Bridgeport*, 97 Conn. 657; 117 Atl. 811;
United States v. *United Engineering Co.*, 234 U. S. 236.

Petitioner has been able to find no law contra to its position on the main point under discussion, and logical reasoning with respect thereto certainly does not give any support to the "clear sky" position of the Court below:

> "The very assumption of such a covenant on the part of the builder (to complete the structure within a limited time) implies an understanding by all parties that they were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractor to perform, should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations, providing for the performance of work by one party under

> a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion." *Mansfield v. N. Y. C. & H., supra.*

Petitioner was given no opportunity below to argue this point, either in its brief or orally. Government counsel had conceded it in their brief, and they did not mention the point at all in oral argument. The first intimation that the point was involved insofar as petitioner's counsel were concerned was when the opinion was promulgated. It is useless for petitioner to speculate why the Court below saw fit to make such an unusual ruling, of its own notion and without explanation of any sort. Petitioner's counsel are, of course, familiar with the general rule in negligence law, that a defendant cannot be held liable for the negligent acts of an independent contractor. But that rule has no application in contract law, and likewise its basic logic is predicated upon factors not existent here. In any event, if the rule of contract construction law is to be changed, legal posterity deserves some formal statement of the reasons for the change. The Court below gave none, assuming the rule was clear. Whether this Court might agree or disagree with the rule as announced below, it is submitted that it should take jurisdiction in order either to give its sanction to the new rule or to correct the substantial injustice done petitioner.

The Court below was in error in holding defendant not liable for additional work, essential to completion of the contract structures, which resulted from the furnishing by the Government of Faulty, Inconsistent and Inadequate plans.

The Court below found, with respect to petitioner's claim for additional plastering and furring—

> "It was found, however, that a great many horizontal and vertical pipes had to be run in places not shown

by the drawings, due to discrepancies between the mechanical and architectural drawings, of which there were about 500. The location of the pipes was determined by the defendant's superintendent of construction as the work progressed. This required the contractor to do a great deal of furring not called for by the drawings. This was done by plaintiff at the direction of the defendant's superintendent of construction. It was an extra made necessary by defendant's defective drawings, but plaintiff is barred from recovery therefor by Article V of the contract, quoted above."

Article V provided:

"Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

The Court below was in error in treating this item of claim as "extra work" within the meaning of Article V. Because of the 500 discrepancies between the architectural and mechanical drawings, the location of thousands of horizontal and vertical pipes had to be "determined by the defendant's superintendent of construction as the work progressed". It is obvious that the contract structures could never have been completed if these pipes and risers had not been installed; and due to the faulty plans furnished by the government no one could tell just where they were to be installed except piece by piece as the work progressed. The pipes and risers likewise had to be furred, and it would have been impossible to have written a change order and inserted therein a definite price for the additional furring under the circumstances recited. The only way the buildings could have been finished was by the method pursued: the locations of pipes and risers was determined as the work progressed, step by step; this necessitated extra plastering and furring by petitioner, who was told to present its claim

after the job had been done, when it would know what the cost would be.

The Court of Claims allowed petitioner two items of claim for additional work, one for repairing and the other for brushing plaster, both jobs having been caused by failure of the government to furnish heat. The theory upon which the Court permitted recovery was that the failure to furnish heat constituted a breach of the contract, and defendant hence was liable for resulting damages.

It is difficult for petitioner to see the legal distinction between those items of claim and the instant one. The instant item of claim grew out of a breach by the defendant of its contract through failure to supply workable plans. As the Court below found, there were about 500 discrepancies between plans that should have dove-tailed. Certainly, it was an implied condition of the contract that the government as owner would supply accurate and usable plans and specifications. It did not fulfill this obligation, forcing its superintendent of construction to make plans as the construction progressed. The furnishing of these faulty plans constituted as much a breach of contract as the failure to furnish heat, and if petitioner was entitled to recover for the additional work of repairing and brushing plaster, it should have been allowed its damages resulting from the government's failure to furnish proper plans—especially when the additional work in question was an integral part of an essential to production of a completed structure.

Petitioner's claim for additional labor charges on plaster and furring, due to failure to furnish heat and because of delay by the mechanical trades, should have been allowed.

Petitioner proved that because of delay, partly occasioned by the admitted failure of the government to furnish heat pursuant to its contract obligation and partly due to dis-

organization of the work of the mechanical trades, it incurred additional labor charges of $13,809.73 in doing the contract plastering and furring. As stated hereinbefore, this item of claim received no specific mention in the opinion below. It is probable that the Court assumed what it had said about delays in general covered the matter. If that be true, disallowance by the Court below of this item resulted from petitioner's failure to segregate its proof so as to show how much of the delay was due to the direct fault of the government and what portion to the fault of the government's mechanical contractor. Hence, this item must stand or fall upon the same arguments submitted on the main question.

Respectfully submitted,

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